

VEDDER PRICE (CA), LLP  
Heather M. Sager, Bar No. 186566  
hsager@vedderprice.com  
275 Battery Street, Suite 2464  
San Francisco, California 94111  
T: +1 (415) 749 9500  
F: +1 (415) 749 9502

VEDDER PRICE P.C.  
Alain Villeneuve (admitted *pro hac vice*)  
avilleneuve@vedderprice.com  
Michael J. Waters (admitted *pro hac vice*)  
mwaters@vedderprice.com  
222 North LaSalle Street  
Suite 2600  
Chicago, Illinois 60601-1003  
T: +1 (312) 609-7500  
F: +1 (312) 609-5005

Attorneys for Plaintiff  
FITNESS ANYWHERE LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FITNESS ANYWHERE LLC,  
  
Plaintiff,  
  
v.  
  
WOSS ENTERPRISES LLC.,  
  
Defendant.

Case No. 5:14-cv-01725 BLF

**FITNESS ANYWHERE LLC'S TRIAL  
BRIEF**

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Plaintiff Fitness Anywhere LLC (“TRX”) respectfully submits this Trial Brief to summarize its theory of the case and identify key evidence. TRX asserts claims against Defendant WOSS Enterprises, LLC. (“WOSS”) for patent infringement, federal trademark infringement, federal and state unfair competition, and tortious interference with prospective economic relationships.

## **I. WOSS’S PATENT INFRINGEMENT**

TRX will prove that WOSS willfully infringed the claims of U.S. Patent No. 7,044,896 (the “’896 patent”), both directly and indirectly (through induced and contributory infringement).

### **a. The ’896 Patent**

TRX is the owner of the ’896 patent, titled “Exercise device including adjustable, inelastic straps.” The application which resulted in the ’896 patent was filed on April 9, 2003, and the patent issued on May 16, 2006. The ’896 patent names Randal A. Hetrick as the sole inventor. Mr. Hetrick is the founder of TRX, and he will testify at trial to his conception and reduction to practice of his invention and its assignment to TRX.

The ’896 patent relates to an adjustable exercise device. Before the ’896 patent, individuals utilized bulky and heavy weight systems or a multitude of elastic resistance bands in order to perform full-body workouts. The invention claimed in the ’896 patent provides an inelastic exercise device that can provide a range of resistances and be used for a full-body workout. The exercise device has an inelastic member comprising a substantially inelastic flat strap, a pair of grips, and an anchor, with a first portion for attaching to a structure and a second portion with a flexible portion including a loop which supports an inelastic member.

### **b. The Accused Products**

TRX will prove that six WOSS products infringe the ’896 patent: (i) the Titan ½ in. Wide Strap; (ii) the 300 Equalizer; (iii) the Military Gym Style (later renamed the ATTACK); (iv) the Military 1 in. Trainer; (v) the Military 1 ½ in. Trainer; and (vi) the WOSS XT (collectively, the “Accused Products”). WOSS sold the Accused Products began as early as 2011. All sales are within the 6 year time limitation for obtaining damages. 35 U.S.C. § 286. TRX and WOSS have stipulated that an exemplary Accused Products infringes, all of the Accused Products infringe.

1 In June 2014—mere months after this complaint was filed—WOSS secretly redesigned  
 2 the Accused Products.<sup>1</sup> TRX’s technical expert, Harvey Voris, will testify that this redesign,  
 3 limited to the handle area, was immaterial with respect to the ’896 patent, and that both the “pre-  
 4 redesign” and “post-redesign” versions of the Accused Products infringe claim 1 of the ’896  
 5 patent in a similar fashion.

6 **c. Direct Patent Infringement**

7 *1. Literal Infringement*

8 TRX will prove that WOSS directly infringed the ’896 patent by making, using, offering  
 9 to sell, selling, or importing infringing devices. WOSS has admitted that each of the Accused  
 10 Products is made, used, sold, and/or offered for sale within the United States.<sup>2</sup> As such, to prevail  
 11 on direct infringement, TRX must show that the Accused Products satisfy each and every element  
 12 of claim 1. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1301 (Fed. Cir. 2011). TRX’s  
 13 evidence of WOSS’s infringement will include: (i) a detailed analysis of the Accused Products  
 14 by TRX’s technical expert, Harvey Voris; (ii) the testimony of Randal Hetrick, the inventor of the  
 15 ’896 patent; and (iii) samples of the Accused Products and excerpts from the accompanying  
 16 product manuals that demonstrate the infringing structures.

17 The evidence of WOSS’s infringement will not be difficult for a jury to follow, as the  
 18 recited features are structural elements that will be readily comprehensible. The benefits of the  
 19 patented structure will be explained by Mr. Voris and Mr. Hetrick, and the claimed structures are  
 20 readily apparent in the Accused Products.

21 Each of the Accused Product is sold with one or more anchor, and while one theory of  
 22 infringement is shown below, Mr. Voris will confirm that all anchor configurations infringe. An  
 23 exemplary Accused Product (the WOSS Titan) using one anchor is pictured below, with the  
 24 components corresponding to the language of claim 1 labeled:

25  
 26  
 27 <sup>1</sup> Order Granting Plaintiff’s Motion for Leave to Supplement its Infringement Contentions, ECF  
 70 at 2:9–10; Order Granting Plaintiff’s Motion For Sanctions, ECF 73 at 4:16–18. This redesign  
 28 resulted in \$56,835.75 in sanctions from Magistrate Judge Howard R. Lloyd. ECF 73 and 103.

<sup>2</sup> See Undisputed Fact No. 14.



**CLAIM LANGUAGE**

An adjustable, inelastic exercise device comprising:

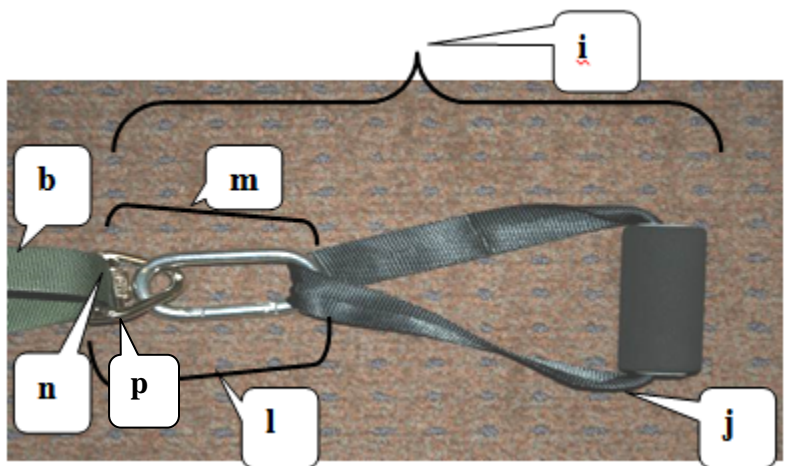
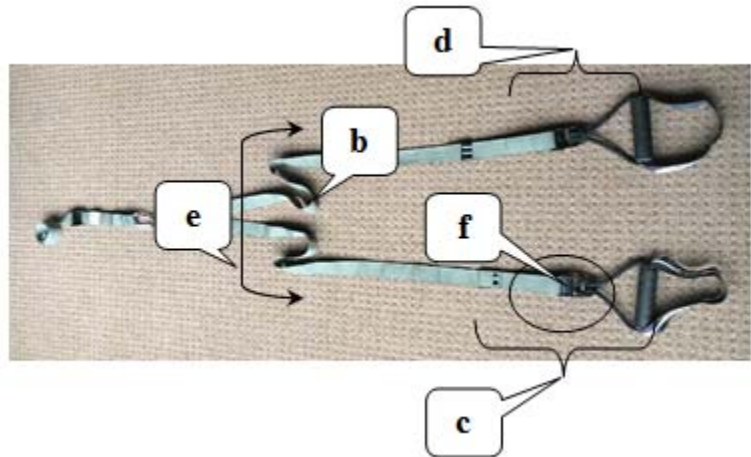
an elongated member (**b**) having a pair of ends (**c**, **d**) separated by a length (**e**) and a mechanism (**f**) for adjusting said length (**e**),

where said elongated member (**b**) is a substantially inelastic flat strap, and

where said pair of ends (**c**, **d**) includes a first end (**c**) having a first grip (**g**) and a second end (**d**) having a second grip (**h**); and

an anchor (**i**) having a first portion (**j**) for mounting to a structure (not shown) and a second portion (**l**) including a flexible portion (**m**) to support said elongated member (**b**) at a position (**n**) along said length (**e**) when both of said grips (**g**, **h**) are pulled in a direction (**o**) away from said anchor (**i**),

wherein said flexible portion (**m**) includes a loop (**p**), and wherein said elongated member (**b**) passes through said loop (**p**).

**EXEMPLARY WOSS PRODUCT**

## 2. Doctrine of Equivalents

Alternatively, TRX will prove that the Accused Products include an equivalent element for each claim element that is literally present. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 733 (2002) (“The doctrine of equivalents allows the patentee to claim those



insubstantial alterations that were not captured in drafting the original patent claim but which could be created through trivial changes.”). An equivalent element is one which performs substantially the same function in substantially the same way to obtain substantially the same result. *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 35 (1997). Mr. Voris will testify regarding the presence of equivalent structures in the Accused Products, including that (i) the combination of one or more metal loops with an inelastic strap in the Accused Products is an equivalent structure to the recited “flexible portion [which] includes a loop” and (ii) the combination of an elongated flat strap, pair of cam buckles, and ropes passing through handgrips is equivalent to the recited “elongated member having a pair of ends separated by a length and a mechanism for adjusting said length, where said elongated member is a substantially inelastic flat strap, and where said pair of ends includes a first end having a first grip and a second end having a second grip.”

**d. Indirect Patent Infringement**

WOSS’s counsel had indicated WOSS will not argue it does not directly infringe claim 1 because it does not sell the Accused Products in an assembled form.<sup>3</sup> However, if WOSS does make this argument, TRX will prove that WOSS contributed to infringement by its end users and actively induced its end users to infringe claim 1 of the ’896 patent.

**e. WOSS’s Infringement Is Willful**

A defendant engaging in misconduct beyond mere infringement is liable for willful patent infringement. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016). To show willful patent infringement, TRX will prove that WOSS was aware of the ’896 patent before it began selling the Accused Products and that it continued to infringe even after TRX (i) notified WOSS that it was infringing the ’896 patent on March 21, 2014 and (ii) filed this lawsuit on April 14,

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<sup>3</sup> WOSS also is liable for direct patent infringement, regardless of whether the Accused Products are sold in an assembled form. WOSS has assembled and used the Accused Products itself, as evidenced by the photographs contained in the instruction manuals provided with the Accused Products. The Accused Products are also designed to be assembled in an infringing configuration and have no useful non-infringing purpose. *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1556 (Fed. Cir. 1995); *Paper Converting Mach. Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 19 (Fed. Cir. 1984).

2014. TRX will introduce the testimony of Mr. Storum<sup>4</sup> and Mr. Ott<sup>5</sup> (the founders of WOSS), who admit that they were aware of TRX's products and the '896 patent before they sold any of the Accused Products. TRX will prove that WOSS has acted in bad faith, wantonly, maliciously, deliberately, consciously, wrongfully, flagrantly, or with reckless disregard of the asserted claims of the '896 patent. 35 U.S.C. § 284; *Halo*, 136 S. Ct. at 1932.

**f. WOSS's Affirmative Defenses**

WOSS stipulated that it will not directly challenge validity of the '896 patent. ECF 178. WOSS's only remaining defense to TRX's patent infringement claims is to contest infringement.

WOSS contends that the Accused Products lack one or more elements specified in claim 1 and thus do not infringe. Specifically, WOSS has argued that the Accused Products lack at least one of the following elements: (i) "flexible portion [that] includes a loop"; (ii) "an elongated member having a pair of ends separated by a length and a mechanism for adjusting said length" (where said elongated member is a substantially inelastic flat strap); and (iii) "wherein said flexible portion includes a loop, and wherein said elongated member passes through said loop." *See, e.g.*, ECF 174 at 10. TRX's technical expert, Mr. Harvey Voris, will testify that each of these elements is present in each of the Accused Products. For example, the labeled photograph on pages 3–4 above demonstrates the portions of an exemplary Accused Product that Mr. Voris will testify meet these limitations. WOSS will not present any expert testimony at trial to rebut Mr. Voris's opinions or otherwise to support WOSS's noninfringement arguments.

WOSS's first and third arguments are legal arguments regarding claim construction, rather than factual questions for the jury, and have already been resolved by this Court. Essentially, WOSS argues that claim 1 of the '896 patent requires a "flexible loop" through which an elongated member passes and that the Accused Products include a metal, rigid loop. *See, e.g.*, ECF 151 at 1. This legal argument is based on a mischaracterization of the Court's claim construction, and it has already been rejected by the Court. ECF 155 at 2 ("[C]ontrary to Woss' assertion, the [Court's] order [of August 23, 2016] finds that 'claim 1 *does not require* the loop to

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<sup>4</sup> Storum Dep. 82:23–86:16.

<sup>5</sup> Ott. Dep. 38:18–22.

1 be flexible,’ not that the loop must be rigid.”).

2 WOSS’s second argument is that the limitations “an elongated member having a pair of  
3 ends separated by a length and a mechanism for adjusting said length” and “where said elongated  
4 member is a substantially inelastic flat strap” are absent from the Accused Products because the  
5 Accused Products include small lengths of rope connecting the cam buckles to the hand grips.  
6 However, WOSS will present no expert witness (and thus no testimony) to rebut Mr. Voris’s  
7 opinion that the Accused Products contain this structure either literally or under the doctrine of  
8 equivalents, as shown for example on pages 3–4 above.

## 9 **II. WOSS’S TRADEMARK INFRINGEMENT**

10 TRX will prove that WOSS has willfully infringed TRX’s federally registered trademarks  
11 SUSPENSION TRAINING and FITNESS ANYWHERE (collectively, the “TRX Marks”) by  
12 (1) using the marks SUSPENSION TRAINING, SUSPENSION TRAINER, and similar  
13 variations thereof; and (2) using the mark SUSPENSION FITNESS in association with the sale in  
14 commerce of its identical goods (collectively, the “Infringing Marks”).

### 15 **a. The TRX Trademarks**

16 TRX owns U.S. Trademark Registrations Nos. 3,255,160 and 3,255,161 for the mark  
17 SUSPENSION TRAINING, which were issued by the U.S. Patent and Trademark Office on June  
18 26, 2007, for use in connection with manually operated exercise equipment in Class 28 and  
19 physical education services, physical fitness consolation, and physical fitness instruction in Class  
20 41, respectively. The first registration was renewed on June 28, 2012 and the second registration  
21 was renewed on June 28, 2012. Both are incontestable. 15 U.S.C. § 1065. TRX also owns U.S.  
22 Trademark Registration No. 2,975,844, issued by the U.S. Patent and Trademark Office on July  
23 26, 2005, for the mark FITNESS ANYWHERE in International Class 028 for manually operated  
24 exercise equipment. This registration was renewed on August 23, 2011 and is incontestable.

25 WOSS cannot dispute that the TRX Marks are owned by TRX, are registered, and are  
26 incontestable. TRX will provide evidence from at least Mr. Hetrick, Ms. Christie, and Mr. Zadoff  
27 regarding TRX’s ownership and use of the TRX Marks throughout the United States. Registration  
28 of these marks is a constructive notice of TRX’s claim of ownership. 15 U.S.C. § 1072.

**b. WOSS's Infringement**

“A successful trademark infringement claim under the Lanham Act requires a showing that the claimant holds a protectable mark, and that the alleged infringer's imitating mark is similar enough to "cause confusion, or to cause mistake, or to deceive.” *Survivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 630 (9th Cir. 2005). “While an intent to confuse consumers is not required for a finding of trademark infringement, intent to deceive is strong evidence of a likelihood of confusion. When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived.” *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1148 (9th Cir. 2002). “The test for likelihood of confusion is whether a ‘reasonably prudent consumer’ in the marketplace is likely to be confused as to the origin of the good or service bearing one of the marks.” *Dreamwerks Prod. Grp. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998).

TRX will prove that WOSS has infringed TRX's trademark SUSPENSION TRAINING and FITNESS ANYWHERE by (i) using an identical mark in connection with goods and services that are similar to those offered by TRX; (ii) using the mark SUSPENSION TRAINER in connection with goods and services that are similar to those offered by TRX; and (iii) using the mark SUSPENSION FITNESS in connection with goods and services that are similar to those offered by TRX. TRX will prove that WOSS used the Infringing Marks in a manner likely to cause confusion among consumers as to the origin or quality of WOSS's goods. For example, TRX will prove that WOSS used these marks prominently in its product advertisements and product pages in a manner designed to confuse customers into believing there was some association, relationship, or connection between WOSS's products and those offered by TRX. Both WOSS and TRX sold their products online, and they even sold products side by side using Amazon.com. As Ms. Christie will testify, a customer searching for the TRX Marks on Amazon.com would encounter a combination of TRX products and WOSS products side by side because of WOSS's use of the Infringing Marks.

WOSS has admitted to using the mark SUSPENSION FITNESS in commerce as a mark,<sup>6</sup>

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<sup>6</sup> See Undisputed Fact No. 11.

1 and it even attempted to register this mark with the USPTO. TRX will introduce undisputed  
 2 examples of WOSS's commercial use of the Infringing Marks and admissions from Mr. Storum  
 3 and Mr. Ott. Ms. Christie will also provide evidence of WOSS's using the Infringing Marks.

4 **c. Validity of the TRX Marks**

5 WOSS has indicated that it will attempt to challenge the validity of the TRX Marks by  
 6 alleging that the TRX Marks are descriptive or generic.<sup>7</sup> As the TRX Marks are incontestable,  
 7 WOSS cannot allege that they are invalid based on descriptiveness. *Park 'N Fly, Inc. v. Dollar*  
 8 *Park & Fly, Inc.*, 469 U.S. 189, 205 (1985) ("We conclude that the holder of a registered mark  
 9 may rely on incontestability to enjoin infringement and that such an action may not be defended  
 10 on the grounds that the mark is merely descriptive."); *K.P. Permanent Make-Up Inc. v. Lasting*  
 11 *Impression I, Inc.*, 408 F.3d 596, 606 (9th Cir. 2005) ("A descriptive mark that has become  
 12 incontestable is conclusively presumed to have acquired secondary meaning. This means that a  
 13 defendant in a trademark infringement action cannot assert that an incontestable mark is invalid  
 14 because it is descriptive and lacks secondary meaning.") (citations omitted).

15 "Federal registration of a trademark endows it with a strong presumption of validity. The  
 16 general presumption of validity resulting from federal registration includes the specific  
 17 presumption that the trademark is not generic." *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250,  
 18 1254 (9th Cir. 1982) (citations omitted). In order to overcome this strong presumption, WOSS  
 19 would need to present evidence that the primary significance of the TRX Marks to the consuming  
 20 public is to denote the goods offered under the TRX Marks and **not** TRX as the source of those  
 21 goods. *K.P. Permanent Make-Up Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 606 (9th Cir.  
 22 2005). WOSS will not be able to overcome this presumption. It will not present expert testimony  
 23 on this issue, and will not call customers to discuss their perceptions of the TRX Marks.<sup>8</sup>

24 Further, TRX will present evidence establishing that customers recognize the TRX Marks

25 <sup>7</sup> Joint Pretrial Statement, ECF 174 at 3–4.

26 <sup>8</sup> WOSS has indicated that it will attempt to offer various documents purportedly showing  
 27 descriptive or generic use of the TRX Marks. While WOSS has indicated that Cynthia Haden (an  
 28 employee with WOSS's counsel) may be called to authenticate these documents, neither she nor  
 any other witness designated by WOSS is qualified to present expert testimony regarding  
 customers perceptions or the relevance of such documents regarding validity.

1 as identifying TRX as the source of its goods and services, including testimony from Ms. Christie  
 2 (a TRX employee tasked with policing TRX’s intellectual property), Ms. Leanda Cave (a leading  
 3 fitness professional), Mr. Tom Campanaro (president of a leading fitness equipment company),  
 4 and Mr. Hetrick. TRX will also offer evidence of the degree to which TRX has advertised under  
 5 the TRX Marks and the success of those efforts with testimony from TRX employees, including  
 6 Mr. Hetrick, Ms. Christie, and Mr. Paul Zadoff. This evidence will also establish the strength of  
 7 the TRX Marks based on the significant advertising expenditures and sales associated with the  
 8 TRX Marks, as well as TRX’s prior efforts to protect the TRX Marks.

9 Finally, TRX will present testimony from Mr. Ott and Mr. Storum to establish (at least  
 10 circumstantially) that WOSS intentionally copied the TRX Marks, as (i) WOSS was aware of  
 11 TRX’s products sold using the TRX Marks; (ii) the uses of the TRX Marks are properly labeled  
 12 as registered trademarks; and (iii) WOSS thus knew that it was copying federally registered  
 13 trademarks when it used the Infringing Marks.

#### 14 **d. WOSS’s Defenses**

15 WOSS has indicated that it will attempt to defend the trademark infringement claims by  
 16 establishing that its use qualifies as “classic fair use” and that there is no likelihood of confusion  
 17 because WOSS included its name in connection with each use of the Infringing Marks.

##### 18 *1. Classic Fair Use*

19 “To establish a classic fair use defense, a defendant must prove the following three  
 20 elements: [(i)] Defendant’s use of the term is not as a trademark or service mark; [(ii)] Defendant  
 21 uses the term fairly and in good faith; and [(iii)] [Defendant uses the term] [o]nly to describe its  
 22 goods or services.” *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002) (internal  
 23 citations and quotations omitted). In the Ninth Circuit, “the classic fair use defense is not  
 24 available if there is a likelihood of customer confusion as to the origin of the product.” *Id.*;  
 25 *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 911 F.2d 363, 365 n.2 (9th Cir. 1990); *Lindy Pen*  
 26 *Co. v. Bic Pen Corp.*, 725 F.2d 1240, 1248 (9th Cir. 1984).

27 TRX will prove that a likelihood of confusion exists as to the origin of the products  
 28 offered by WOSS under the Infringing Marks. Thus, the “classic fair use” defense does not



1 apply. However, to the extent the classic fair use analysis is used to complement the likelihood-  
 2 of-confusion analysis, TRX will prove that WOSS used the Infringing Marks as trademarks and  
 3 that WOSS's use was not made in good faith.

#### 4 2. *Use of Other Marks with the Infringing Marks*

5 WOSS essentially argues that a likelihood of confusion does not exist because it uses its  
 6 name with the Infringing Marks. TRX will present evidence that the balance of the *Sleekcraft*  
 7 factors indicate that a likelihood of confusion exists. Further, even if customer confusion is  
 8 dispelled by the presence of WOSS's name on the same page as the Infringing Marks before an  
 9 actual sale occurs, "initial interest" confusion that creates initial interest in WOSS's products  
 10 using the TRX's Marks "impermissibly capitalizes on the goodwill associated with a mark and is  
 11 therefore actionable trademark infringement." *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 204  
 12 U.S.P.Q. 808 (9th Cir. 1979); *Playboy Enters. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1025  
 13 (9th Cir. 2004). Ms. Christie will testify, a customer searching for the TRX Marks on  
 14 Amazon.com would encounter a combination of TRX products and WOSS products side by side  
 15 because of WOSS's use of the Infringing Marks. Viewing these search results, a customer is  
 16 likely to click on a WOSS product before realizing that WOSS is not associated with TRX.

#### 17 e. **WOSS's Intentional Trademark Infringement**

18 TRX will prove that WOSS used the Infringing Marks intentionally, knowing them to  
 19 infringe TRX's rights in and to the TRX Marks. As discussed above, TRX will prove that WOSS  
 20 was aware of the TRX Marks at least as early as March 21, 2014 based on TRX's initial letter  
 21 alleging infringement, and WOSS was or should have been aware of the TRX Marks when  
 22 WOSS reviewed TRX's products prior to using the Infringing Marks. Further, TRX will prove  
 23 that WOSS's use of at least SUSPENSION TRAINING was done with knowledge (or willful  
 24 blindness) that this mark was a counterfeit mark, as WOSS was or should have been aware of  
 25 TRX's registration of this mark for identical goods. *See, e.g.*, 15 U.S.C. § 1117(b).

### 26 **III. WOSS'S UNFAIR COMPETITION**

27 TRX will prove that WOSS has competed unfairly with TRX by using confusingly similar  
 28 imitations of TRX's federally registered marks and that such use is likely to cause confusion,



1 deception, and mistake by creating the false and misleading impression that WOSS's goods are  
 2 manufactured or distributed by TRX, or are associated with TRX, or have the sponsorship,  
 3 endorsement, or approval of TRX. TRX contends that WOSS's actions are a violation of  
 4 15 U.S.C. § 1125(a) and California Business and Professions Code § 17200.

5 **a. Federal Unfair Competition**

6 Section 43(a)(1) of the Lanham Act sets forth two prongs under which a defendant may be  
 7 found liable for unfair competition: (i) trademark infringement and false designation of origin  
 8 and (ii) false advertising. 15 U.S.C. § 1125(a)(1); *Classic Media, Inc. v. Mewborn*, 532 F.3d 978,  
 9 990–91 (9th Cir. 2008); *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 902–04 (9th Cir. 2007). A  
 10 defendant may be found liable for unfair competition under *either* of these prongs.

11 WOSS is liable under the first prong if it (i) used in commerce (ii) any word, false  
 12 designation of origin, false or misleading description, or representation of fact, which (iii) is  
 13 likely to cause confusion or mistake, or to deceive, as to the sponsorship, affiliation, or origin of  
 14 WOSS's goods or services. 15 U.S.C. § 1125(a)(1)(A); *Freecycle*, 505 F.3d at 902. This is  
 15 essentially the same test as is used for trademark infringement. *New West Corp. v. NYM Co. of*  
 16 *California Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979) (“Whether we call the violation [under  
 17 Section 43(a)(1)(A)] infringement, unfair competition or false designation of origin, the test is  
 18 identical[:] [i]s there a likelihood of confusion?”). TRX will prove that WOSS has unfairly  
 19 competed with TRX by infringing the TRX Marks. *Brookfield*, 174 F.3d at 1046 n. 8 (While  
 20 Section 43(a) “protects against a wider range of practices,” the analysis in terms of trademark  
 21 infringement and unfair competition under the Lanham act is “oftentimes identical.”).

22 WOSS is liable under the second prong if (i) WOSS made a false statement of fact in a  
 23 commercial advertisement about its own or TRX's product; (ii) the statement actually deceived or  
 24 has the tendency to deceive a substantial segment of its audience; (iii) the deception is material, in  
 25 that it is likely to influence the purchasing decision; (iv) WOSS caused its false statement to enter  
 26 interstate commerce; and (v) TRX has been or is likely to be injured as a result of the false  
 27 statement, either by direct diversion of sales from itself to WOSS or by a lessening of the  
 28 goodwill associated with its products. 15 U.S.C. § 1125(a)(1)(B); *Skydive Arizona, Inc. v.*

1 *Quattrocchi*, 673 F.3d 1105, 1110 (9th Cir. 2012)

2 TRX will prove that in WOSS's commercial advertising, it misrepresented the nature,  
3 characteristics, qualities, or geographic origin of TRX's goods and/or WOSS's own goods. 15  
4 U.S.C. § 1125(a)(1)(B). TRX will prove that WOSS falsely (i) described its own goods as being  
5 "Made in the USA" when a substantial portion of WOSS's products originated outside the United  
6 States and (ii) described its products as being sold at a discounted price from their list price,  
7 when WOSS has never sold or offered products at the higher price.<sup>9</sup>

8 **b. California Unfair Competition**

9 California's unfair competition law prohibits and provides civil remedies for unfair  
10 competition, namely, "any unlawful, unfair or fraudulent business act or practice and unfair,  
11 deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200; *Kwikset Corp. v.*  
12 *Superior Court*, 51 Cal.4th 310, 322 (2011). "Because the statute is written in the disjunctive, it  
13 is violated where a defendant's act or practice is (1) unlawful, (2) unfair, (3) fraudulent, or (4) in  
14 violation of section 17500 (false or misleading advertisements)." *Lozano v. AT & T Wireless*  
15 *Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007). The Ninth Circuit has "consistently held that state  
16 common law claims of unfair competition and actions pursuant to California Business and  
17 Professions Code § 17200 are substantially congruent to claims made under the Lanham Act."  
18 *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1180 n.1 (9th Cir. 2013) (citation omitted).

19 TRX will establish that WOSS has competed unfairly under California law using the same  
20 factors provided above with respect to the Lanham Act. TRX will prove that WOSS's claims that  
21 its products were "Made in the USA" violated the California Business and Professions Code,  
22 which makes it unlawful to claim that a product was made in the United States "if the  
23 merchandise or any article, unit, or part thereof, has been entirely or substantially made,  
24 manufactured, or produced outside of the United States." Cal. Bus. & Prof. Code § 17533.7.  
25 TRX will further prove that by advertising products at an artificial list price, WOSS violated  
26

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27 <sup>9</sup> For example, TRX will prove that WOSS advertised a "3000 Equalizer" as having a \$129.99 list  
28 price and a \$37.49 discounted price on Amazon.com when WOSS had never sold or offered the  
"3000 Equalizer" for the higher list price. Ott. Dep. 81:3-18, 82:13-15.

1 California Business and Professions Code § 17501, which states that “[n]o price shall be  
 2 advertised as a former price of any advertised thing, unless the alleged former price was the  
 3 prevailing market price as above defined within three months next immediately preceding the  
 4 publication of the advertisement or unless the date when the alleged former price did prevail is  
 5 clearly, exactly and conspicuously stated in the advertisement.”

6 **IV. WOSS’S TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC**  
**RELATIONSHIPS**

7 TRX will prove that: (1) TRX and purchasers of exercise equipment were in an economic  
 8 relationship that probably would have resulted in an economic benefit to TRX; (2) WOSS knew  
 9 of the relationship; (3) WOSS intended to disrupt the relationship; (4) WOSS engaged in  
 10 wrongful conduct by infringing the ’896 patent and the TRX Marks and unfairly competing with  
 11 TRX by making false or misleading statements regarding TRX’s and/or WOSS’s products; (5) the  
 12 relationship was disrupted; (6) TRX was harmed; and (7) WOSS’s wrongful conduct was a  
 13 substantial factor in causing TRX’s harm. *Youst v. Longo*, 43 Cal.3d 64, 71, n. 6 (1987).

14 WOSS has alleged that TRX cannot prove that WOSS had the necessary intent and that  
 15 WOSS has not committed any independent wrongful act which would support TRX’s claim. To  
 16 establish the requisite intent, TRX needs to prove only that WOSS engaged in an independently  
 17 wrongful act. “It is not necessary to prove that the defendant acted with the specific intent, or  
 18 purpose, of disrupting the plaintiff’s prospective economic advantage. Instead, it is sufficient for  
 19 the plaintiff to plead that the defendant [knew] that the interference is certain or substantially  
 20 certain to occur as a result of his action.” *San Jose Constr., Inc. v. S.B.C.C., Inc.*, 155  
 21 Cal.App.4th 1528, 1544–45 (Cal. App. 2007) (internal citations and quotations omitted).

22 As set forth above, TRX will prove that WOSS engaged in patent infringement, trademark  
 23 infringement, and both federal and state unfair competition. Each of these constitutes an  
 24 independently wrongful act for the purposes of TRX’s tortious-interference claim. *PMC, Inc. v.*  
 25 *Saban Entm’t, Inc.*, 45 Cal.App.4th 579, 603 (Cal. App. 1996) (“Commonly included among  
 26 improper means are actions which are independently actionable, violations of federal or state law  
 27 or unethical business practices, e.g., violence, misrepresentation, unfounded litigation,  
 28

1 defamation, trade libel or trade mark infringement.”) (internal citation omitted).

## 2 **V. DAMAGES**

3 TRX seeks damages for patent infringement, trademark infringement, state and federal  
4 unfair competition, and tortious interference with prospective economic relationships. As more  
5 fully explained in the Expert Report of Kimberly Schenk, TRX seeks patent damages based on  
6 lost profits and a reasonable royalty for any infringing sales that are not subject to lost profits.  
7 TRX will also prove WOSS’s profits attributable to the infringement to the extent not included in  
8 the royalty or lost profits. TRX contends treble damages are warranted due to WOSS’s willful  
9 infringement of the ’896 patent and WOSS’s intentional infringement of the TRX Marks. Ms.  
10 Schenk calculated that 57.5% of the accused units are subject to lost profits (totalling \$7,336,427  
11 through October 2016) and that the reasonable royalty damages on the remaining units not subject  
12 to the lost-profits analysis total \$192,875 through October 2016.

13 TRX’s damages expert conducted separate analyses for WOSS’s use of the mark  
14 SUSPENSION TRAINING / SUSPENSION TRAINER and SUSPENSION FITNESS. TRX  
15 seeks the disgorgement of WOSS’s profits from the infringing uses. TRX bears the burden only  
16 of establishing the amount of WOSS’s revenue; WOSS then must put forward evidence to prove  
17 any expenses that WOSS contends should be deducted.<sup>10</sup> *Am. Honda Motor Co. v. Two Wheel*  
18 *Corp.*, 918 F.2d 1060, 1063 (2d Cir. 1990) (holding that a plaintiff is entitled to the amount of the  
19 defendant’s gross infringing sales unless the defendant adequately proves an amount of costs to  
20 be deducted therefrom). TRX’s damages expert conservatively estimated WOSS’s total revenue  
21 for products sold using (i) the mark SUSPENSION TRAINER from 2011 to 2015 to total  
22 \$832,576 and (ii) the mark SUSPENSION FITNESS to total \$1,749,631.

## 23 **VI. ISSUES TO BE DECIDED BY THE COURT**

24 Several important issues of law remain to be decided by the Court after hearing the  
25 evidence presented at trial.

26 If the jury concludes that WOSS has infringed the ’896 patent, the Court must determine  
27 whether WOSS’s infringement was willful.

28 <sup>10</sup> WOSS has not yet put forward evidence sufficient for TRX’s expert to perform this calculation.

1 The Court must decide as a matter of law what conduct by WOSS would satisfy the  
 2 “wrongful conduct” standard and must specifically state for the jury the conduct that the Court  
 3 has determined. *PMC*, 45 Cal.App.4th at 603. TRX asserts that WOSS’s wrongful conduct  
 4 includes: (i) infringing the ’896 patent; (ii) infringing the TRX Marks; and (iii) unfairly  
 5 competing with TRX under state and federal law by infringing the TRX Marks and making false  
 6 or misleading statements regarding TRX’s products and/or WOSS’s products.<sup>11</sup>

7 TRX seeks injunctive relief to prevent WOSS from further infringing the ’896 patent and  
 8 the TRX Marks as well as from further unfair competition and interference with TRX’s  
 9 prospective economic relationships. To prove that it is entitled to an injunction order against  
 10 WOSS, TRX must show that: (1) it has suffered an irreparable injury; (2) remedies available at  
 11 law, such as monetary damages, are inadequate to compensate for that injury; (3) balancing of  
 12 hardships between TRX and WOSS weighs in favor of the injunction; and (4) the public interest  
 13 would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, LLC*, 547 U.S.  
 14 388, 391 (2006). An injunction is an equitable remedy to be decided by the Court. *Id.* at 394.

15 TRX will show that both the equities and the public interest require an injunction  
 16 preventing WOSS from making, using, and distributing products that infringe the ’896 patent  
 17 and/or the TRX Marks. WOSS’s infringement is a clear case of irreparable injury, and an  
 18 injunction is required to prevent WOSS from further infringement (particularly as WOSS has  
 19 already perpetrated a “secret redesign” of its products during this litigation). TRX anticipates that  
 20 its request for an injunction will be decided by the Court based on evidence presented during trial  
 21 as well as additional evidence presented through a hearing following at least the trial on liability.

22 Dated: February 9, 2017

Respectfully submitted,

VEDDER PRICE (CA), LLP

By: /s/ Heather M. Sager  
 Heather M. Sager

Attorneys for Plaintiff  
 FITNESS ANYWHERE LLC

28 <sup>11</sup> Amended Complaint, ECF 46.